

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOME DEPOT U.S.A., INC.,

Plaintiff

VS.

OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
DEPARTMENT OF LABOR, AND
KATHERINE BISSELL,

Defendants.

CIVIL ACTION NO. _____

HOME DEPOT'S ORIGINAL COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Home Depot U.S.A., Inc. (“Home Depot” or “Plaintiff”) files this Original Complaint for Declaratory Judgment pursuant to the Federal Declaratory Judgments Act, 28 U.S.C. 2201-2202, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706, complaining of Katherine Bissell, Deputy Solicitor of Labor, the Department of Labor (“DOL”) and the Occupational Safety and Health Administration (“OSHA”). In support thereof, Plaintiff would respectfully show the following:

I. JURISDICTION AND PARTIES

1. Plaintiff Home Depot is incorporated in the State of Delaware with its principal office and place of business located in Georgia.

2. OSHA and the DOL are executive agencies of the United States of America and Katherine Bissell, whose agency actions form the basis of the dispute at the heart of this lawsuit, is a Deputy Solicitor of Labor for the DOL. This lawsuit can be served by serving:

(a) the United States Attorney, either by sending a copy of the summons and complaint to (i) the U.S. Attorney for this District (or his or her written designee), Federal Rule of Civil Procedure (“FRCP”) 4(i)(1)(A)(i), or (ii) the “civil-process clerk” at the office of the United States Attorney, FRCP 4(i)(1)(A)(ii);

(b) the United States Attorney General, U.S. Department of Justice, 10th & Constitutional Avenue, N.W., Washington, D.C. 20530, FRCP 4(i)(1)(B); and

(c) to the DOL, OSHA, and Katherine Bissell, Division of Management and Administrative Legal Services, 200 Constitution Avenue, N.W., Suite N-2428, Washington, D.C. 20210, FRCP 4(i)(2).

3. Under the Administrative Procedure Act, 5 U.S.C. §§ 702-705, Home Depot is entitled to judicial review of actions taken by Katherine Bissell, OSHA and the DOL. By letter dated March 14, 2012, Katherine Bissell, Deputy Solicitor of Labor for Regional Operations, DOL, refused much of the Freedom of Information Act (“FOIA”), 5 USCS §§ 552 *et seq.*, request of Home Depot’s counsel made through a written request dated February 10, 2012, a true copy of which is attached as Exhibit “A.” 5 U.S.C. § 702 declares that Home Depot, is “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, [and] is entitled to judicial review thereof.”

4. In Ms. Bissell’s March 14 letter she declares that her letter is a “final agency action” under 5 U.S.C. § 704. Because the agency action concerning Home Depot’s FOIA

request was “final,” Home Depot is entitled to immediate judicial review. Section 704 states (emphasis added):

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are *subject to judicial review*. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the *final agency action*. Except as otherwise expressly required by statute, *agency action otherwise final is final for the purposes of this section* whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5. Under the Federal Declaratory Judgments Act, 28 U.S.C. §§ 2201-2202, any court of the United States has jurisdiction to hear Home Depot’s complaint for relief. Home Depot is entitled to a declaration from this Court of Home Depot’s rights under its FOIA request and an order directing Bissell, OSHA, and the DOL to immediately produce the FOIA materials and information withheld from Home Depot.

II. VENUE AND COURT’S AUTHORITY

6. Under 5 U.S.C. § 703 (emphasis added), Home Depot is entitled to sue in any federal court for a declaratory judgment or mandatory injunction:

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including *actions for declaratory judgments or writs of prohibitory or mandatory injunction* or habeas corpus, in a *court of competent jurisdiction*. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, *agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement*.

This Court is especially appropriate because the agency action at issue relates to discovery and trial issues pending in this Court in *Williams-Smith, et al. vs Designers Edge, et al*, Civil Action No. 3:10-cv-00590 (the “Underlying Suit”).

7. The Underlying Suit arises out of an alleged industrial accident at the business premises of Thermal Polymer Systems (“TPS”). The accident is alleged to have occurred during the priming of the inside of a tank with a highly flammable chemical, Chemlok 289. The chemical allegedly ignited when a halogen light was used in the vicinity of the tank. Plaintiffs claim the halogen light in question was one manufactured by Designers Edge and sold under Home Depot’s “WorkForce” brand and allegedly unreasonably dangerous as designed and marketed. Defendants strenuously deny Plaintiffs’ claims and allegations.

8. Under 5 U.S.C. § 706, this Court has the authority to take any action it deems necessary, including compelling the offending agency to take action:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

III.
FACTUAL BACKGROUND

9. This declaratory judgment action arises out of a dispute between Plaintiff Home Depot and OSHA regarding materials from OSHA's investigation of the accident at issue in the Underlying Suit that were requested under FOIA by Home Depot, but withheld and/or redacted by OSHA, the DOL, and Bissell.

10. By letter dated February 10, 2012, through legal counsel, Home Depot made a written FOIA request, to which OSHA and the DOL responded via letter dated March 14, 2012, on behalf of Katherine Bissell, Deputy Solicitor of Labor, DOL. In her letter, Bissell promised to produce limited and redacted documents from OSHA's investigative file, but not all factual investigative materials sought by Home Depot under FOIA. (*See* Exhibit "A" attached hereto).

11. Bissell ordered the production of 3 items: OSHA Investigation Report Number 31292117; Interview Statement of Randy Taylor (deceased); and Sworn Statement of Gary Murrell (company representative), but withheld portions of the Investigation Report under what were called the "informant privilege" and the "Trade Secrets Act" (alleged to be "employee information that Thermal Polymer's may have a proprietary interest in protecting"). Her letter provided no identifiable detail upon which Home Depot could ascertain the type of information withheld or the validity of these alleged bases for withholding.

12. The limited witness statements and other evidence produced by OSHA/DOL directly contradict Plaintiffs' central contention that they were unaware of the risk associated with using a halogen light in proximity to Chemlok 289. The documents disclosed indicate that the TPS workers at issue discussed the risk of an explosion immediately before the accident and deliberately chose to ignore the OSHA-mandated safety requirements so these employees could leave work

early. The documents disclosed directly contradict the testimony of several key witnesses to this case and raise serious questions regarding the truthfulness of those witnesses on several key issues.

13. OSHA has not disclosed its entire file concerning its factual investigation on bases that offer *no legal justification* – the so-called “informant privilege” and “Trade Secrets Act” rights of TPS. When this Court reviews the withheld information, such exemptions will fall by the wayside and this Court will require production of OSHA/DOL’s entire factual investigation (*sans* redactions) to Home Depot – information and documents that will directly disprove Plaintiffs’ case in the Underlying Suit and, perhaps, lead to summary disposition of the Underlying Suit without wasting 4+ weeks of this Court’s and the public’s time and resources.

IV.

BASES FOR DECLARATORY RELIEF

14. Because the March 14, 2012 letter from Bissell bases OSHA/DOL’s nondisclosure and/or redaction of certain documents on (i) “informant privilege” and (ii) the “Trade Secrets Act,” Bissell, OSHA, and the DOL have waived any other basis under 5 U.S.C. Section 552(b) for refusing to provide everything sought in Home Depot’s request.

15. Because the purpose of FOIA is to pierce the veil of administrative secrecy, the two exemptions cited by Bissell, OSHA, and the DOL must be narrowly construed. FOIA is a comprehensive effort to publicize all agency action, and FOIA’s exemptions are to be narrowly construed with the purpose of facilitating disclosure.

16. To the extent that Bissell, OSHA, and the DOL are claiming the withheld information is somehow confidential, any promise of confidentiality to the supplier of information is not of itself enough to defeat Home Depot’s right to disclosure of OSHA records as provided for by FOIA. It is not enough to create an exemption from disclosure for Bissell,

OSHA, and the DOL to assert that OSHA received information under a pledge of confidentiality. In fact, even a promise of confidentiality by OSHA in and of itself cannot defeat Home Depot's right of disclosure. *See, e.g., Cooper Cameron Corp. v United States DOL*, 280 F3d 539 (5th Cir. 2002) (OSHA failed to make sufficient factual showing that it promised confidentiality to witnesses to make their statements exempt from disclosure).

17. Bissell, OSHA, and the DOL waived any basis for exempting or redacting information by failing to provide a *detailed justification* for its refusal, providing nothing more than conclusory statements. Bissell, OSHA, and the DOL were required to provide sufficient detailed information to Home Depot as to (1) why portions of documents withheld could not be segregated, (2) the agency's page-by-page review of all investigative records contained in the requested documents, and (3) the agency's determination as to each document, and each page of each document, why withheld information was subject to withholding exemptions.

18. In addition, Bissell, OSHA, and the DOL had to provide Home Depot with an assurance of compliance with FOIA's segregability requirement; that is, under 5 USCS § 552(b), the identification of the custodian and recipients of each withheld document, the extent identification was possible without copious search, and sufficient information in an index of withheld documents to allow Home Depot to determine the validity of Bissell, OSHA, and the DOL's claimed exemptions.

19. Bissell, OSHA, and the DOL seem to have improperly fused together unnamed exemptions in an attempt to create an exemption that does not exist – an “informant privilege.” No such specific exemption for information provided to OSHA in its investigation exists. The cases Bissell relies upon in her March 14, 2012 letter deal primarily with witnesses in criminal or quasi-criminal proceedings and not OSHA enforcement actions.

20. To the extent Bissell, OSHA, and the DOL are referencing the Privacy Act (5 U.S.C. § 552a) as a basis to withhold requested information, and not just the privacy exemption under 5 U.S.C. § 552(b)(4), the Privacy Act cannot override the requirements to prove a (b)(4) privacy exemption. The Privacy Act was not intended to override FOIA and in operation only prohibits release of information not covered by FOIA or discretionary release of material which, while exempt from FOIA, an agency might have previously chosen to release. In fact, material exempt from disclosure under the Privacy Act does not prevent disclosure of such material under FOIA.

21. Bissell, OSHA, and the DOL's reference to the "Trade Secrets Act," presumably 18 U.S.C. § 1905, does not provide Bissell, OSHA, and the DOL with any basis for excluding the requested information under 5 U.S.C. § 552(b)(3) [providing for exclusion if another statute requires withholding a document]. The Trade Secrets Act is not a (b)(3) exemption statute because its prohibition against disclosure is not absolute nor does it categorize information to be withheld or contain criteria for withholding. If the information Bissell, OSHA, and the DOL seek to withhold from public disclosure is not specifically mentioned in 18 U.S.C. § 1905, then that statute cannot exempt information from release under terms of an exemption under FOIA, 5 U.S.C. § 552(b)(3). *See Shermco Indus. v Sec'y of United States Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980).

22. Bissell, OSHA, and the DOL failed to provide the required detailed finding and explanation for claiming any information was withheld as "Trade Secret" information. To prove a "trade secret" exemption from disclosure under 5 U.S.C. § 552(b)(4), OSHA had to provide the following elements: (a) the withheld or redacted information must be financial or commercial in nature; (b) it must be obtained from a person outside the government structure; and (c) it must be

confidential or privileged. The term "trade secrets," for purposes of this exemption, is defined as a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. *See Public Citizen Health Research Group v Food & Drug Admin.*, 704 F.2d 1280 (D.C. Cir. 1983).

23. The purpose of this exemption is to protect confidentiality of information which is obtained by the government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This exemption does not apply to all information given to the government in confidence, but exempts only (1) trade secrets and (2) information which is (a) commercial or financial and (b) privileged or confidential.

24. The phrase "privileged or confidential" is intended to modify "commercial or financial information" so as to limit the class of commercial or financial information that is immune from disclosure to that which is privileged or confidential. Indeed, exemption (b)(4) must be read narrowly. *Shermco Indus. v Sec'y of United States Air Force*, 452 F. Supp. 306 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980).

25. Bissell, OSHA, and the DOL erred in withholding or redacting any information received from Randy Taylor, deceased, as any such information ceased to have privacy protection once Mr. Taylor died. Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C), does not shield discovery documents obtained from now-deceased persons. Privacy rights do not survive an individual's death and cannot be asserted by members of an individual's family. This FOIA exemption requires a showing of the invasion of privacy of a *living individual*.

26. Moreover, Bissell, OSHA, and the DOL cannot claim under 5 U.S.C. 552(b)(7)(A) that production of the information requested might interfere with OSHA's enforcement proceedings, because those proceedings ended with citation of TPS on July 26, 2010. No interference with a concluded OSHA investigation could possibly occur. Exemption (b)(7)(A) applies only in cases in which enforcement proceedings are *pending*. Even then, any such exemption would have to give way to the public interest in monitoring OSHA's investigation and outweighs any possible privacy protection of employees, making the particular records sought by Home Depot not exempt from disclosure. See *Cooper Cameron Corp. v United States DOL*, 280 F.3d 539 (5th Cir. 2002).

27. OSHA, the DOL, and Bissell failed to satisfy any of the FOIA exemptions permitted in withholding information requested by Home Depot. As a result of OSHA, the DOL, and Bissell's failures, Home Depot is entitled to a declaration by this Court and an order to OSHA, the DOL, and Bissell to immediately turn over all FOIA information and documents requested by Home Depot.

28. In addition, Plaintiff Home Depot has had to retain legal counsel to pursue its declaratory action and has incurred necessary attorneys' fees and costs in connection with that defense. Accordingly, Plaintiff seeks recovery for the attorneys' fees and costs caused by OSHA, the DOL, and Bissell's actions.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Home Depot requests that OSHA, the DOL, and Bissell be cited to appear and answer herein, and that upon a final hearing, Plaintiff have judgment as follows:

- (1) This Court's declaration that OSHA, the DOL, and Bissell failed to satisfy any claimed exemptions under FOIA and must immediately provide all requested information and materials to Home Depot;
- (2) A Court order directing OSHA, the DOL, and Bissell to immediately turn over all FOIA material and information sought by Home Depot;
- (3) Reasonable and necessary attorneys' fees and other legal expenses incurred in connection with this declaratory judgment;
- (4) Costs of suit; and
- (5) Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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